Decision 14-07-027 July 10, 2014

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 08-08-009 (Filed August 21, 2008)

ORDER DENYING REHEARING OF DECISION 10-12-048

I. INTRODUCTION

This decision addresses the applications for rehearing of Decision (D.) 10-12-048 (or "Decision"), filed by Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and NextEra Energy Resources ("NextEra"). In the Decision, we authorized a new procurement process called the Renewable Auction Mechanism, or RAM, for the procurement of smaller renewable energy projects (under 20 megawatts) that are eligible for the California Renewable Portfolio Standard ("RPS") Program.[1] We adopted an interim procurement obligation of 1000 megawatts ("MW") for the RAM program which we allocated to the IOUs: PG&E, SCE, and San Diego Gas & Electric Company ("SDG&E").

[1] The California RPS Program was established by Senate Bill ("SB") 1078 (Stats. 2002, ch. 516, § 3, codified as Section 399.11 *et seq*., of the Public Utilities Code, chaptered September 12, 2002, effective January 1, 2003). It has been amended several times, including by SB 107 (Stats. 2006, ch. 464) and more recently by SB 2 (1X) (Stats. 2011, ch. 1). The current RPS program requires investor-owned utilities ("IOUs"), electric service providers ("ESPs"), and community choice aggregators ("CCAs") to increase procurement from eligible renewable energy resources to 33 percent of total procurement by 2020.

PG&E, SCE, and NextEra each filed a timely application for rehearing of D.10-12-048. PG&E contends that the Decision violates: (1) the cost limitation provisions of the RPS statute by failing to expressly state that PG&E has no obligation to purchase above Market Price Referent ("MPR") resources after it has exhausted its above-market funds ("AMF") cost cap; (2) Public Utilities Code Section 399.15(b)(1)[2] by requiring the IOUs to procure its allocated capacity under the RAM program after it has achieved its 20 percent RPS goal; and (3) Sections 399.12(g), 380(e), and 365.1 by failing to apply the RAM program to other load-serving entities ("LSE") including ESPs and CCAs.

SCE raises similar arguments in its application for rehearing. SCE argues that D.10-12-048: (1) unlawfully concludes that the cost limitation provisions of Section 399.15(d) do not apply to the RAM; (2) violates section 399.15(b)(1) by unlawfully requiring the IOUs to procure additional renewable resources after meeting its statutory RPS goal; and (3) fails to treat all LSEs the same as required by law.

NextEra's rehearing application requests that we clarify an ambiguity in D.10-12-048 on the IOUs' ability to negotiate bilaterally with a Qualifying Facility ("QF") or the repowering of QFs.

Independent Energy Producers Association ("IEP"), Vote Solar Initiative ("Vote Solar"), Solar Alliance, Silverado Power LLC ("Silverado"), Alliance for Retail Energy Markets ("AReM"), Western Power Trading Forum ("WPTF") (jointly, "AReM/WPTF"), Marin Energy Authority ("MEA"), PG&E, and SCE filed responses to the rehearing applications. IEP, Solar Alliance, Vote Solar, AReM/WPTF, and MEA opposed all or portions of PG&E's and SCE's Applications for Rehearing. IEP, Silverado, AReM/WPTF, PG&E, and SCE supported NextEra's Application for Rehearing, and SCE supported PG&E's Application for Rehearing.

[2] Unless noted otherwise, all statutory references are to the Public Utilities Code. In addition, unless otherwise specified, all references to Sections 399.12 and 399.15 are to the version of that section in effect at the time of issuance of D.10-12-048 and the filing of the rehearing applications.

Concurrent with filing its rehearing application, NextEra filed a Petition for Modification of D.10-12-048. In its petition, NextEra sought clarification that the prohibition on bilateral contracting in D.10-12-048 does not extend to bilateral negotiations involving QFs and repower of QF projects. Concurrent with filing its response to the applications for rehearing, IEP filed a Petition for Modification of D.10-12-048 requesting that the Commission maintain the ability of IOUs and small renewable project developers to discuss and mutually agree to the terms for a purchase and sale of renewable energy. On April 20, 2011, we issued D.11-04-008 granting the petitions, and modifying D.10-12-048 to eliminate the prohibition on bilateral contracting subject to certain provisions.

Subsequent to the issuance of D.10-12-048, and the filing of the applications for rehearing, the Legislature enacted and the Governor signed SB 2 (1X) (Stats 2011, ch. 1) effective December 10, 2011. SB 2 (1X) requires implementation of higher RPS targets and modifies many other aspects of the RPS program including the cost limitation provisions discussed in PG&E's and SCE's rehearing applications.

We have reviewed each and every allegation set forth in the applications for rehearing of PG&E, SCE, and NextEra and are of the opinion that good cause has not been demonstrated to warrant a rehearing. The passage of SB 2 (1X) repealed the prior cost containment process, and thus, has rendered PG&E's and SCE's issue with the cost containment mechanism moot. NextEra's Application for Rehearing is rendered moot by D.11-04-008.

II. DISCUSSION

A. Passage of SB 2 (1X) renders the issue involving the cost limitation provision moot.

Both PG&E and SCE contend that D.10-12-048 violates the RPS cost limitation provision found in Section 399.15(d) by requiring IOUs to procure above-market price renewable offers despite having reached their cost limitation. (PG&E Rehrg. App., pp. 2-5; SCE Rehrg. App., pp. 5-7.) Section 399.15(d) required the Commission to establish, for each electrical corporation, a limitation on the total costs

expended above the MPR for the procurement of eligible renewable energy resources. PG&E and SCE contend that the Decision erroneously concludes that the limitation imposed by Section 399.15(d) on procurement of renewable energy at prices above the MPR does not apply to the RAM. (PG&E Rehrg. App., p. 4; SCE Rehrg. App., p. 6).

SCE maintains that our interpretation of Section 399.15(d) wrongly focuses on only Section 399.15(d)(2) which addresses the types of contracts that may count toward the cost limitation, and ignores Section 399.15(d)(3) which addresses what happens when the cost limitation is exhausted. (SCE Rehrg. App., p. 6.) While SCE agrees that only contracts selected through the IOUs' annual RPS solicitation count toward meeting the cost limitation under Section 399.15(d)(2), the reference in Section 399.15(d)(3) to "procurement" covers all procurement and is not limited to the IOUs' annual RPS solicitation. (SCE Rehrg. App., p. 6.) SCE argues that once the cost limitation is exhausted, we can no longer require electrical corporations to procure renewable resources at a cost above the MPR regardless of whether it is through an annual RPS solicitation or some other mechanism. (SCE Rehrg. App., p. 6.) PG&E makes similar arguments.

Both PG&E and SCE also contend that our interpretation in D.10-12-048 is contrary to the plain language of the statute and contrary to the Legislature's explicit intent in enacting the cost limitation provision which was to continue meaningful ratepayer protections. (PG&E Rehrg App., p. 4; SCE Rehrg. App., p. 6.)

Since the Commission issued D.10-12-048, the Legislature enacted and the Governor signed into law SB 2 (1X) (Stats. 2011 ch. 1.), which was effective on December 10, 2011. Among other things, SB 2 (1X) deleted the existing MPR provisions and requires the Commission to establish new cost containment requirements.[3] Thus, the language SCE and PG&E take issue with has been repealed. As such, this issue has been rendered moot.

[3] The Commission is currently developing the cost containment mechanism for utility RPS procurement in R.11-05-005.

B. D.10-12-048 does not require the IOUs to purchase more than 20 percent renewable energy resources.

PG&E and SCE contend that D.10-12-048 unlawfully requires the IOUs to procure renewable energy through the RAM after the IOU has achieved its 20 percent RPS goal.[4] Specifically, PG&E and SCE argue that by failing to allow the IOUs to suspend the RAM program, D.10-12-048 violates Section 399.15(b)(1) which states that "[a] retail seller with 20 percent of retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of renewable energy resources in the following year." (PG&E Rehrg. App., p. 5; SCE Rehrg. App., p. 4.) PG&E and SCE state that the Decision's claim that the RPS program targets are "minimums, not maximums," is inconsistent with the statutory language. (PG&E Rehrg. App., p. 5; SCE Rehrg. App., p. 4.) Moreover, PG&E contends that the Decision's rationale that subjecting the RAM 1000 MW cap to further reductions based on RPS targets would "add unnecessary confusion and complexity" and provides no basis for ignoring the statutory mandate. (PG&E Rehrg. App., p. 5.) SCE also adds that the Decision's rationale that "the risk of over-procurement. . . is minor" is not justification for violating the express language of Section 399.15(b)(1). (SCE Rehrg. App., p. 4.)

PG&E and SCE are in error. D.10-12-048 does not require the IOUs to procure renewable energy through the RAM after the IOU has achieved its RPS goal. Rather, D.10-12-048 sets an allocated capacity that the IOUs must purchase under the RAM. The IOUs have the ability to adjust the procurement of renewables through other programs if over procurement becomes an issue. As D.10-12-048 states, "If over-procurement becomes a serious risk, IOUs may slightly reduce new contracts selected pursuant to the annual solicitation or other programs that do not have allocated capacity." (D.10-12-048, p. 28.)

[4] SB 2 (1X) increased the required procurement from eligible renewable energy resources to 33 percent of total procurement by 2020.

C. D.10-12-048 does not err by requiring only the three largest IOUs to procure renewable energy resources though the RAM.

PG&E and SCE assert that D.10-12-048 unlawfully applied the RAM program only to IOUs and not other LSEs. Specifically, PG&E and SCE contend that Section 399.12 requires ESPs and CCAs to be "subject to the same terms and conditions applicable to an electrical corporation" under the RPS statute. (PG&E Rehrg. App., p. 6; SCE Rehrg. App., p. 2.) PG&E and SCE further contend that Section 380(e) requires equal treatment for all LSEs. (PG&E Rehrg. App., p. 6; SCE Rehrg. App., p. 2.) SCE argues that Sections 399.12 and 380(e) also require the RAM program be applied to the small and multi-jurisdictional utilities ("SMJU") and takes issue with exempting the SMJUs on the grounds that it would be impractical to impose the RAM on them given their size. (SCE Rehrg App., p. 3.) Finally, PG&E and SCE contend that the more recently enacted Section 365.1 (Stats. 2009, ch. 337) requires ESPs to be subject to the same requirements as the IOUs under the RPS program, and PG&E notes that the statute states that "[t]his mandate 'applies notwithstanding any prior decision of the commission to the contrary.' " (PG&E Rehrg. App., pp. 6-7; SCE Rehrg. App., pp. 2-3.)

1. Background

In D.05-11-025, we delineated our approach to implementing the RPS program requirements for ESPs, CCAs and SMJUs. In that decision, we interpreted the ambiguous language in Section 399.12 as giving us the discretion to determine the manner in which ESPs, CCAs, and SMJUs were to participate in and comply with RPS requirements. Specifically, we recognized that, "[a]lthough §399.12 requires that the Commission make ESPs 'subject to the same terms and conditions applicable to an electrical corporation,' it also requires the Commission to determine the 'manner' in which those entities participate." (*Opinion on Participation of Energy Service Providers, Community Choice Aggregators, and Small and Multi-Jurisdictional Utilities in the Renewables Portfolio Standards Program* [D.05-11-025] (2005) ___ Cal. P.U.C.3d___,

p. 5 (slip op.).) We reasoned that this ambiguity indicated that "the Commission has some discretion to make different requirements of ESPs than utilities." (*Id*.)

We further found that the language in Section 380(e), which says that ESPs shall be subject to the same terms and conditions applicable to electrical corporations, is similar to that language in Section 399.12 but did not replace or modify the language in Section 399.12 that requires us to determine the "manner in which" ESPs comply with RPS program. (D.05-11-025, p. 6 (slip op.).) Thus, we found that "to harmonize these competing directives, the Commission [] must exercise judgment and discretion in determining the manner of ESP participation in the RPS program." (*Id.*) We determined that the same rationale applied to CCAs as the statutory language for CCAs was similar to that applicable to ESPs. (*Ibid*.)

We then identified fundamental aspects or requirements of the RPS program that would apply to all LSEs. These were that LSEs procure 20 percent of retail sales from renewable sources by 2010, increase their renewable retail electricity sales by at least 1 percent per year through 2010, report their progress toward meeting the RPS program requirements to the Commission, be permitted to use the same flexible compliance mechanism, and be subject to the same penalties and penalty process. (D.05-11-025, p. 26 [COL 1] (slip op.).)

Section 365.1 was enacted in 2009 by SB 695 (Stats. 2009, ch. 337). Among other things, Section 365.1 required that once we had begun the process of reopening direct access transactions, we must ensure that "other providers are subject to the same requirements" of the RPS program as the three large IOUs. (Pub. Util. Code, § 365.1, subd. (c)(1).) The term "other providers" is defined in the statute to include ESPs and exclude CCAs and does not address SMJUs. (Pub. Util. Code, § 365.1, subd. (a).)

On January 13, 2011, we issued *Decision Revising Rules for the Renewables Portfolio Standard Pursuant to Senate Bill 695* [D.11-01-026] (2011) ___ Cal. P.U.C.3d___, which implemented Section 365.1. In D.11-01-026, we found that SB 695 gave us the responsibility to review and revise the obligations of ESPs in

comparison to those of the large utilities under the RPS program. (*Id*. at p. 27 [Finding of Fact ("FOF") 1] (slip op.).) We concluded that going forward, we should consider the mandate of Section 365.1 in all decisions about the RPS program. (*Id*. at p. 27 [COL 6] (slip op.).) However, we also rejected arguments advocating for identical RPS structures between IOUs and non-IOUs. We stated:

> This Commission has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates. In contrast, the Commission has responsibility for the price reasonableness of IOU procurement, and the reasonableness of IOU rates. Section 365.1(c) does not require that the Commission take elements of the procurement practices of the utilities it regulates with respect to procurement and rates and impose them on the ESPs that it does not regulate with respect to procurement and rates, simply because the Commission has authority over ESPs' participation in the RPS program, and we decline to do so here.

(D.11-01-026, *supra* at pp. 22-23 (slip op.).)

2. Discussion

Based on the above history and our prior interpretation of these laws, we conclude that PG&E and SCE's argument that the RAM must apply to all LSEs is incorrect. As we previously determined, ambiguity in the language of Section 399.12 and the need to harmonize Section 399.12 with Section 380(e) indicates that the Commission has some discretion to make different requirements of ESPs than utilities. (D.05-11-025, *supra*, at p. 5 (slip op.).)

In D.11-01-026, we addressed the more recently enacted Section 365.1. There we found that while SB 695 (Stats. 2009, ch. 337) requires us to review and revise the obligations of ESPs in comparison to those of the IOUs under the RPS program, it does not require the us to impose on the ESPs requirements we adopt for the IOUs that are related to our responsibility to ensure price reasonableness of the IOUs' procurement and the reasonableness of the IOUs' rates.

Although D.10-12-048 was issued one month before the issuance of D.11-01-026, it is consistent with the approach we took in that decision. D.10-12-048 considered the requirements of Section 365.1 but recognized that "specific RPS program elements necessarily vary among LSEs based on the Commission's regulatory authority, responsibilities, and duties with regard to each type of LSE [footnote omitted]." (D.10-12-048, p. 24.) In considering whether the RAM should apply to ESPs, we found that it was not appropriate to apply the RAM to ESPs because we have no regulatory authority over the ESPs contracting process. Specifically we stated:

> The Commission has no regulatory authority over ESP contracting processes. Such authority extends from the Commission's regulatory rate authority over IOUs and serves no purpose with regard to ESP contracts since the Commission has no regulatory rate authority over ESPs. In addition, because the ESPs do not submit their contracts to us for approval, and a key benefit and objective of RAM as a procurement vehicle is to provide streamlined contract approval for projects that conform to the RAM eligibility requirements, it is not relevant to the ESPs. (D.10-12-048, p. 24.)

The RAM is not a fundamental RSP program requirement. The RAM is a procurement tool we adopted to streamline the procurement process for smaller renewable energy projects. The RAM provides the IOUs with another tool to use to reach the RPS targets and goals. (D.10-12-048, p. 93 [COL 55].) In adopting a RAM, we are exercising our jurisdictional oversight of IOU procurement. Simplifying the procurement process and reducing transaction costs is part of our regulatory responsibility over IOUs.

Because the RAM is not a fundamental RPS program requirement but is a procurement tool implemented as part of our regulation of the IOUs, it is within our discretion to determine whether or not SMJUs should participate in the RAM program. D.10-12-048 determined that the application of the RAM to the SMJUs is impractical

given their size and supported this determination with appropriate findings of fact. (D.10-12-048, pp. 24-25, 82 [FOF 13 & 14].)

D. Applying the RAM to only the IOUs is not unlawful discrimination.

SCE argues that by excusing certain LSEs from RPS-related obligations that the IOUs are required to fulfill, we are creating different standards for different LSEs in a discriminatory manner in violation of California Law. (SCE Rehrg. App., p. 3.)

SCE's rehearing application fails to meet the requirements of Section 1732. SCE makes only general statements that the Commission is creating different standards for LSEs in a discriminatory manner and does not provide any further analysis or discussion. Such a general allegation fail**s** to meet the requirements of Section 1732 and Rule 16.1(c) of the Commission's Rules of Practice and Procedure. An application for rehearing must contain specific claims because the application's purpose is to "alert the Commission to legal error, so that the Commission may correct it expeditiously." (Rule 16.1(c) of the Commission's Rule of Practice and Procedure.) The Commission has further ruled that '[s]imply identifying a legal principal or argument, without explaining why it applies in the present circumstances does not meet the requirements of Section 1732." (See Order Instituting Rulemaking to Consider Adoption of General Order and Procedures to Implement Digital Infrastructure [D.10-07-050] (2006) __Cal.P.U.C.2d__, p. 19 (slip op.).)

Even if we were to consider SCE's allegation of unlawful discrimination, it would fail. To demonstrate unlawful discrimination, SCE must not only show that it was treated differently than ESPs, CCAs and SMJUs, but also that it is either similarly situated to these entities or that the disparate treatment is not justified. (See, e.g., *Griffiths v. Superior Court* (2002) 86 Cal.App.4th 757, 775-776.) SCE has failed to do so. ESPs, CCAs, and SMJUs are not similarly situated to IOUs. As we discussed in D.10-12-048, our regulatory authority over IOUs differs from that of ESPs and CCAs, and the SMJUs are significantly smaller than the three larger IOUs to which the RAM program applies. (D.10-12-048, p.24.) Moreover, in D.10-12-048, we explained the

policy reasons as to why the ESPs, CCAs, and SMJUs should not be subject to exactly the same procurement obligations as the IOUs. (D.10-12-048, pp. 24-25.) Thus, SCE's claim of unlawful discrimination fails.

E. NextEra's request for rehearing is moot.

NextEra requests that we clarify an ambiguity in D.10-12-048 on the IOUs' ability to negotiate bilaterally with QFs or the repowering of QFs. NextEra states that D.10-12-048 precludes bilateral negotiations of projects that are 20 MW or smaller but includes references to the intent of the Commission to exempt QFs from the prohibition on bilateral agreements. (NextEra Rehrg. App., p. 1.) NextEra states that the exemption is not included in the Decision's findings and conclusions thus creating an ambiguity. (NextEra Rehrg. App., p. 1.) Concurrent with filing its Application for Rehearing, NextEra also filed a Petition for Modification asking us to modify D.10-12-048 to clarify that the prohibition on bilateral contracting does not extend to bilateral negotiations involving QFs and repowering of QF projects. As mentioned previously, IEP also filed a Petition for Modification on this issue.

On April 20, 2011, we issued D.11-04-008 granting the petitions and modifying D.10-12-048 to eliminate the prohibition on bilateral contracting subject to certain provisions. Thus, this particular issue is rendered moot and NextEra's rehearing application is denied.

III. CONCLUSION

For the reasons stated above, rehearing of D.10-12-048 is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.10-12-048 is hereby denied.
2. This proceeding, Rulemaking (R.) 08-08-009, is closed.

This order is effective today.

Dated July 10, 2014, at San Francisco, California.

MICHAEL R. PEEVEY
President
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
MICHAEL PICKER
Commissioners

Commissioner Michel Peter Florio,
Being necessarily absent, did not
Participate.